Majlis Perbandaran Pulau Pinang v Lembaga Rayuan Negeri Pulau Pinang & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL N P–01–45 OF 2002
GOPAL SRI RAM, ABDUL AZIZ MOHAMAD AND MOHD GHAZALI JJCA
14 NOVEMBER 2005

Administrative Law — Exercise of administrative powers — Local authority — Planning permission for development — Appeal against directive of appellant — Whether appellant had powers to issue directive and whether appealable — Whether first respondent had jurisdiction to hear appeal — Whether judicial review was appropriate rather than appeal — Town and Country Planning Act 1976 ss 21, 22(3), 23, 23(1)

This was a case concerning the judicial review of administrative action. It involved the interpretation of certain sections in the Town and Country Planning Act 1976 ('the Act'). The appellant is the local planning authority for Pulau Pinang. Section 22(3) of the Act empowers it to make certain decisions. The first respondent is the Appeal Board established under s 36 of the Act. Section 23 of the Act vests jurisdiction in the first respondent to hear appeals against decisions made pursuant to s 22(3). On 30 December 1993, the second respondent which is a property developer applied to the appellant for planning permission to carry out certain work. The work related to the demolition of an existing building and for the construction of a 20 storied building on that site. On 26 April 1994, the appellant wrote to the second respondent. It directed the second respondent to amend the plans it had submitted and to re-submit the amended plans. In its letter, the appellant also informed the second respondent that if the amended plans were not submitted within three months, the original application would be deemed as withdrawn. On 21 February 1995, after the expiry of the three months specified by the appellant, the second respondent's architect returned to the appellant a set of amended layout plans. The appellant responded by requiring the second respondent to preserve the existing building and to construct the new building in its vicinity. This direction of the appellant was given under s 21(3)(g) of the Act. The second respondent then appealed to the first respondent against the aforesaid direction. The appeal was lodged pursuant to s 23 of the Act. At the hearing of the appeal, the appellant raised a preliminary objection as to jurisdiction. It argued that the first respondent had no jurisdiction to hear the appeal because the appellant's direction given as aforesaid was not an appealable decision. The first respondent overruled the objection. Thereafter the appellant moved the High Court for judicial review which that court declined. The appellant appealed to the Court of Appeal.

Held, allowing the appeal:

(1) The first respondent's power to hear appeals is only where the appellant grants planning permission either absolutely or subject to such conditions as it thinks

fit to impose, or refuses to grant planning permission. Other acts by the appellant done or omitted to be done are not appealable (see para 6).

(2) Section 23(1) of the Act has been purposely cast in the way it has to avoid the first respondent being bogged down with appeals against all the directions which the appellant has to give in the course of carrying out its business. If Parliament intended for there to be a right of appeal against decisions made or directions given under other provisions of the Act, it would have said so expressly. It is no function of a court, save in very exceptional circumstances to supply omissions in a statute. The High Court in the present case embarked upon an exercise of unauthorised legislation (see para 8).

(3) The High Court was concerned that someone in the position of the second respondent would be remediless if there was no provision for an appeal. This was an error. Decisions, directions, acts and omissions of the appellant falling outside the immediate scope of 23(1) of the Act may be made the subject matter of judicial review in the ordinary way. So, the second respondent was not without recourse. In the present case, it should have sought judicial review and not proceeded by way of appeal (see para 8).

(4) The position in the present case is analogous to that which obtained in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. As such, the court to be bound to follow that decision. Since the direction given by the appellant is not appealable, it follows that the first respondent could not hear the appeal. The High Court ought therefore to have quashed the decision of the first respondent on the jurisdictional point (see para 10).

[Bahasa Malaysia summary

Ini adalah satu kes berkaitan dengan kajian semula kehakiman berhubung tindakan pentadbiran. Ia melibatkan pentafsiran seksyen-seksyen tertentu dalam Akta Perancangan Bandar dan Desa 1976 ('Akta tersebut'). Perayu merupakan pihak berkuasa perancangan tempatan untuk Pulau Pinang. Seksyen 22(3) Akta tersebut memberikan kuasa kepadanya untuk membuat beberapa keputusan tertentu. Responden pertama adalah Lembaga Rayuan yang ditubuhkan di bawah s 36 Akta tersebut. Seksyen 23 Akta tersebut memberi bidang kuasa kepada responden pertama untuk mendengar rayuan-rayuan terhadap keputusan-keputusan yang dibuat menurut s 22(3). Pada 30 Disember 1993, responden kedua yang merupakan pemaju tanah telah memohon kepada perayu untuk kebenaran perancangan bagi menjalankan kerja tertentu. Kerja tersebut adalah berkaitan runtuhan bangunan yang sedia ada dan untuk pembangunan bangunan 20 tingkat di atas kawasan tersebut. Pada 26 April 1994, perayu telah menulis kepada responden kedua. Ia telah mengarahkan responden kedua meminda pelan-pelan yang ia telah kemukakan dan untuk menghantar semula pelan-pelan yang dipinda. Dalam suratnya, perayu juga memaklumkan responden kedua bahawa jika pelan-pelan yang dipinda itu tidak dikemukakan dalam tempoh tiga bulan, permohonan asal akan dianggap telah ditarik balik. Pada 21 Februari 1995, selepas tamat tempoh tiga bulan yang ditetapkan oleh perayu, arkitek responden kedua telah mengembalikan kepada perayu satu set pelan-pelan susun atur yang dipinda. Perayu menjawab dengan

menghendaki responden kedua mengekalkan bangunan yang sedia ada dan membina bangunan baru dalam kawasan itu. Arahan perayu ini telah diberikan di bawah s 21(3)(g) Akta tersebut. Responden kedua kemudian merayu kepada responden pertama terhadap arahan tersebut. Rayun telah dibuat menurut s 23 Akta tersebut. Semasa perbicaraan rayuan tersebut, perayu telah menimbulkan satu bantahan awal berhubung bidang kuasa. Ia berhujah bahawa responden pertama tiada bidang kuasa untuk mendengar rayuan tersebut kerana arahan perayu yang diberikan bukan satu keputusan yang boleh dirayu. Responden pertama telah menolak bantahan tersebut. Berikutan itu perayu telah memohon Mahkamah Tinggi untuk kajian semula kehakiman yang mana mahkamah tolak. Perayu telah merayu kepada Mahkamah Rayuan.

Diputuskan, membenarkan rayuan tersebut:

(1) Kuasa responden pertama untuk mendengar rayuan-rayuan hanya di mana perayu memberikan kebenaran perancangan sama ada secara mutlak atau tertakluk kepada syarat-syarat yang difikirkan sesuai untuk dikenakan, atau menolak kebenaran perancangan itu. Tindakan lain oleh perayu yang telah dilakukan atau ditinggalkan tidak boelh dirayu (lihat perenggan 6).

(2) Seksyen 23(1) Akta tersebut telah digubal sedemikian rupa agar dapat mengelakkan responden pertama daripada dibebani oleh rayuan-rayuan terhadap semua arahan-arahan yang perayu perlu berikan sepanjang melaksanakan tugasnya. Jika Parlimen berhasrat agar perlu ada hak untuk merayu terhadap keputusan-keputusan yang dibuat atau arahan-arahan yang diberikan di bawah peruntukn lain Akta tersebut, ia akan menyatakan sedemikian. Ia bukan fungsi mahkamah, kecuali dalam keadaan-keadaan luar biasa untuk memperuntukkan peninggalan dalan suatu statut. Mahkamah Tinggi dalam kes semasa telah memulakan satu amalan perundangan yang tidak diberi kuasa (lihat perenggan 8).

(3) Mahkamah Tinggi bimbang bahawa seseorang dalam kedudukan responden kedua tidak akan mendapat remedi jika tidak ada peruntukan untuk suatu rayuan. Ini adalah satu kesilapan. Keputusan, arahan, tindakan dan peninggalan perayu yang di luar skop sedia ada s 23(1) Akta tersebut boleh dijadikan perkara utama kajian semula kehakiman seperti cara biasa. Oleh itu, responden bukanlah tiada jalan keluar. Dalam kes semasa, ia sepatutnya memohon kajian semula kehakiman dan tidak bermula melalui rayuan (lihat perenggan 8).

(4) Kedudukan dalam kes semasa adalah seakan-akan serupa dengan apa yang diputuskan dalam *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. Oleh demikian, mahkamah terikat untuk mengikut keputusan tersebut. Memandangkan arahan yang diberikan oleh perayu bukan suatu yang boleh dirayu, oleh itu responden pertama tidak boleh mendengar rayuan tersebut. Mahkamah Tinggi sepatutnya telah membatalkan keputusan responden pertama berkaitan isu bidang kuasa (lihat perenggan 10).]

Notes

For cases on local authority, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 66–74.

Cases referred to

Chandrasekaran Thangavelu & Anor v AL Annamalai & Anor [2004] 4 MLJ 297 (refd)

Chellapah v Malayan Railway Administration [1948-491 MLJ Supp 173 (refd)

Lee Chow Meng v Public Prosecutor [1978] 2 MLJ 36 (refd)

Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1 (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1 (folld)

Legislation referred to

Town and Country Planning Act 1976 ss 21(3)(g), 22(3), 23(1), s 24(3), 36

Appeal from: Originating Motion No 25–116 of 1997 (High Court, Pulau Pinang)

Gurbachan Singh (Lourdunathan Andrew with him) (Andrew & Co) for the appellant.
Soffian bin Ahmad Kassim (Pulau Pinang Legal Adviser) for the respondents.

Gopal Sri Ram JCA (delivering the judgment of the court):

[1] This is a case concerning the judicial review of administrative action. Among other things, it involves the interpretation of certain sections in the Town and Country Planning Act 1976 ('the Act'). The appellant is the local planning authority for Pulau Pinang. Section 22(3) of the Act empowers it to make certain decisions. The first respondent is the Appeal Board established under s 36 of the Act. Section 23 of the Act vests jurisdiction in the first respondent to hear appeals against decisions made pursuant to 22(3). On 30 December 1993, the second respondent which is a property developer applied to the appellant for planning permission to carry out certain work. The work related to the demolition of an existing building and for the construction of a 20 storied building on that site.

[2] On 26 April 1994, the appellant wrote to the second respondent. It directed the second respondent to amend the plans it had submitted and to re-submit the amended plans. This request was prompted by the comments the appellant had received from some of its planning departments. In its letter, the appellant also informed the second respondent that if the amended plans were not submitted within three months, the original application would be deemed as withdrawn.

[3] On 21 February 1995, that is to say, after the expiry of the three months specified by the appellant, the second respondent's architect returned to the appellant a set of amended layout plans with a fresh proposal to demolish the existing building and the construction of a 24 storied building. The appellant responded by requiring

the second respondent to preserve the existing building and to construct the new building in its vicinity. This direction of the appellant was given under s 21(3)(g) of the Act. About this there is no dispute.

[4] The second respondent then appealed to the first respondent against the aforesaid direction. The appeal was lodged pursuant to 23 of the Act. At the hearing of the appeal the appellant raised a preliminary objection as to jurisdiction. It argued that the first respondent had no jurisdiction to hear the appeal because the appellant's direction given as aforesaid was not an appealable decision. The first respondent overruled the objection. Thereafter the appellant moved the High Court for judicial review which that court declined. The appellant then appealed to us. The appeal was allowed and the appropriate orders, to which I will refer later, were made.

[5] In order to appreciate the reasoning, I propose to embark upon, it will be useful if I set out the relevant provisions of the Act. These are as follows:

> 21(1) An application for planning permission in respect of a development shall be made to the local planning authority and shall be in such form and shall contain such particulars and be accompanied by such documents, plans, and fees as may be prescribed.
>
> (3) Where the development involves the erection of a building, the local planning authority may give written directions to the applicant in respect of any of the following matters, that is to say —
>
> > (g) any other matter that the local planning authority considers necessary for purposes of planning.
>
> (4) The applicant to whom any written directions are given under subsection (3) shall amend the plan submitted with his application accordingly and resubmit the plan within such period or extended period as the local planning authority may specify.
>
> (5) If the plan is not resubmitted within the specified period or extended period, the application for planning permission shall be deemed to have been withdrawn but the applicant may submit a fresh application. 22(3)After taking into consideration the matters specified in subsection (2), the local planning authority may, subject to subsection (4), grant planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuse to grant planning permission. 23(1) An appeal against the decision of the local planning authority made under subsection 22(3) may be made to the Appeal Board within one month from the date of the communication of such decision to him...

[6] You will see at once that the first respondent's power to hear appeals is only where the appellant grants planning permission either absolutely or subject to such conditions as it thinks fit to impose, or refuses to grant planning permission. Other acts by the appellant done or omitted to be done are not appealable.

[7] Now, the right of appeal is not a common law right either as a matter of private or public law. It is a creature of statute. If it is not given then it does not exist. And once given, it is a substantive and not a mere procedural right. Support for these propositions may, if sought, be found in *Chandrasekaran Thangavelu & Anor v AL*

Annamalai & Anor [2004] 4 MLJ 297; *Lee Chow Meng v Public Prosecutor* [1978] 2 MLJ 36 and *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1.

[8] It would appear that the High Court found against the appellant principally on the ground that there was a hiatus in 23(1) of the Act. With respect I disagree. The section has been purposely cast in the way it has to avoid the first respondent being bogged down with appeals against all the directions which the appellant has to give in the course of carrying out its business. If Parliament intended for there to be a right of appeal against decisions made or directions given under other provisions of the Act it would have said so expressly. It is no function of a court, save in very exceptional circumstances as were present in *Chellapah v Malayan Railway Administration* [1948-491 MLJ Supp 173, to supply omissions in a statute. In my respectful judgment, the High Court in the present case embarked upon an exercise of unauthorised legislation. I think that the High Court was concerned that someone in the position of the second respondent would be remediless if there was no provision for an appeal. This is an error. Decisions, directions, acts and omissions of the appellant falling outside the immediate scope of 23(1) of the Act may be made the subject matter of judicial review in the ordinary way. So, the second respondent was not without recourse. In the present case it should have sought judicial review and not proceeded by way of appeal.

[9] I would add for good measure that the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1, referred to us by the appellant fairly supports its case. There Edgar Joseph Jr FCJ said this:

> Dr Das, for the Council, submitted that the Society's letter dated 10 August 1993 praying for a review of the Council's decision imposing the disputed decision was not an appeal under s 23, read with s 24(5) of the Act, to the Appeal Board constituted under s 36, and indeed, Mr Sethu for the Society himself submitted that the refusal by the Council to reconsider its decision to impose the disputed condition was not appealable under s 23, read with s 24(3) of the Act which provides that an appealable decision would be one granting or refusing planning permission or imposing a disputed condition. In our view, both these submissions by Dr Das and Mr Sethu are plainly correct.

[10] The position in the present case is analogous to that which obtained in the *Sungai Gelugor* case. As such, I find this court to be bound to follow that decision. Learned counsel attempted to distinguish the *Sungai Gelugor* case but to no avail. He also sought to argue that the passage relied on by the appellant was not open to the interpretation suggested by the appellant. With respect, I cannot agree.

[11] Since the direction given by the appellant is not appealable, it follows that the first respondent could not hear the appeal. The High Court ought therefore to have quashed the decision of the first respondent on the jurisdictional point.

[12] For the reasons already given, the appeal was allowed and the orders of the High Court were set aside and an order in terms of the appellant's motion was made, save that no order as to costs was made in respect of the first respondent here and below. The second respondent was ordered to pay all the costs incurred here and in

the court below. The deposit was ordered to be refunded to the appellant. As I have already said, the second respondent is not without other remedy.

[13] My learned brothers Abdul Aziz Mohamad and Mohd Ghazali JJCA have seen this judgment in draft and have expressed their agreement with it.

Appeal allowed.

Reported by Peter Ling